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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3407 OF 2002
IN
SUIT NO.3940 OF 2002

M/s.D.Vasantrai & Co. ... Plaintiffs

V/s.

Jayantilal M. Jain ... Defendant

Ms.Yasmin E. Tavaria i/b D.A. Barot for Plaintiffs
Mr.N.N. Vaishnava i/b N.N. Vaishnava & Co. for Defendant

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **APRIL 21, 2006**

P.C.:

. The Motion has been taken out for appointment of the Receiver and for a direction against the Defendants to vacate the suit premises being 150 sq.ft. of Shop Nos.3 and 4, abutting on J.S.S. Marg situate at Ground floor, Sethna, Building, Mumbai-400 002. The Plaintiffs have also sought to be appointed as agents of the Court Receiver without any security and charges.

2. The Plaintiffs are tenants of the suit premises. They contend that they had entered into an agency agreement with one Ashok Jain, the brother of the Defendant. After the expiry of this agreement Ashok Jain removed his goods from the suit premises. A similar agreement was entered into by the Plaintiffs and the Defendant. Clause 13 of the Agency agreement reads as under:

> "The parties hereto hereby state and declare that the Agents are carrying on business of selling Principal’s goods from the said premises which exclusively in possession and occupation of the Agents. The Principal shall have no right, title or interest of any nature in the said shop premises or any part thereof. The monthly rent of the said shop premises shall be paid by the Agents only and the principal shall be paid by the Agents only and the principal shall have nothing to contribute for the same. The Electricity bills shall be paid by the Agents. However, the Agents shall be entitled to recover the Electricity charges from the Principal. It is further agreed that the Agents alone shall be entitled to put their lock on the said premises and they shall open the shop during working hours. The Principal shall have no right to have duplicate key of the lock.

The agreement between the Plaintiffs and the Defendant was terminated on 31.10.2002 and according to the Plaintiffs the Defendant removed his goods from the suit premises.

3. The Plaintiffs allege that the defendant had removed the locks of the suit premises and took forcible possession of the suit premises without any authority of

law. A suit for injunction was filed before the City Civil Court being Suit No.6353 of 2002 by the Plaintiff. On 3.12.2002, the City Civil Court appointed the Court Commissioner to inspect the suit premises to ascertain as to who was in possession of the suit premises. The Commissioner's report which is annexed to the plaint indicates that the plaintiffs were in possession of the premises. It is the case of the Plaintiffs that thereafter the Defendant forcibly entered into the suit premises.

4. In reply, the defendant contends that he had entered into a leave and licence agreement with the plaintiffs in respect of the suit premises. He confirms that he has been in possession of the suit premises continuously and in fact it was the plaintiffs who had in his absence duplicated the key to the lock premises and entered the suit premises when the Commissioner visited the premises. He contends that the orders in the Suit before the City Civil Court were never served on him and that the suit was withdrawn soon thereafter. It is submitted on behalf of the Defendant that at all times it is the defendant who has been in possession and the plaintiffs have no right to enter the suit premises. It is also submitted by relying on the judgment of this Court in the case of *Kishore H. Desai v/s. Lilawati Virji Chheda & Ors.*, **1990(1) Bom.C.R. 160** that any report of the Commissioner which is made behind the back of a party is not binding on that party. The parties

must be made aware of the Commissioner's visit to the premises in advance in order to remain present during the inspection. He submits that the Defendant was never informed of the Commissioner's visit and, therefore, the report of the Commissioner cannot be relied on.

5. The suit before the City Civil Court was withdrawn six months after the filing of the present suit in December 2002. The Commissioner's report is annexed to the plaint. The defendant has not bothered to challenge that report at any point of time. In my view, there is no evidence on record at all to indicate that the defendant was in possession of the suit premises as a licensee. The original agreement for agency which is produced indicates that the relationship between the plaintiffs and the defendant was that of an agent and the principal respectively. In these circumstances, I am of the view that the Plaintiffs are entitled to the reliefs claimed.

6. Motion is made absolute in terms of prayer clause (b).

7. Mr.Vaishnava, learned Advocate for the Defendant seeks a stay of this order. Stay refused.